No. 77-1196

In the Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD SHERWIN and RONALD CORYELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1977. A petition for rehearing was denied on January 24, 1978. The petition for a writ of certiorari was filed on February 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court adequately instructed the jury on the issue of scienter.

2. Whether the introduction of unlawfully seized magazines at trial might have improperly influenced the jury's evaluation of the obscenity *vel non* of the lawfully seized magazines or of petitioners' scienter as to such magazines.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted on three counts charging interstate shipment of an obscene magazine—"Private No. 8"—in violation of 18 U.S.C. 1462. Petitioner Sherwin was also convicted of conspiring to commit the substantive offense in violation of 18 U.S.C. 371.[1] Petitioner Sherwin was placed on two years' probation and fined $17,000; petitioner Coryell was placed on two years' probation and fined $4,500. The court of appeals affirmed (Pet. App. A).

The evidence showed that petitioners shipped three copies of "Private No. 8" from Durand, Michigan, to Los Angeles, California. These magazines were lawfully seized (Pet. App. A9). They also shipped copies of two other obscene magazines, "Color Climax No. 3" and "Color Climax No. 4." These magazines were admitted at trial and formed the basis for petitioners' convictions on four other counts. The court of appeals reversed the convictions on those counts, ruling that since the "Color Climax" magazines were not named in the search warrant (only "Private No. 8" was named), they were unlawfully seized and should have been excluded at trial (Pet. App. A3-A9).

ARGUMENT

1. The district court charged that the jury must find petitioners had knowledge of the "sexual orientation" of the materials in order to convict (Tr. 244-246).

[1]Sherwin's co-conspirator was Leonard Hawkins, whose indictment was dismissed by the government prior to trial. See Record on Appeal at 355.

Petitioners contend (Pet. 4-9) that this charge was defective and that the jury should have been instructed to determine whether petitioners knew the "contents, character and nature" of the materials. This contention quibbles with words and does not raise a matter of substance.

In *Hamling* v. *United States,* 418 U.S. 87, the Court held that proof of scienter does not require proof of knowledge of the legal status of the materials[2]. In so doing it approved the instructions given by the trial court in that case (*id.* at 123):

> We think the "knowingly" language of 18 U.S.C. §1461 and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant *had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials.* [Emphasis added.]

Petitioners misconstrue this passage from *Hamling* to require that a scienter instruction include the words "contents, character and nature." But there is nothing in *Hamling* to suggest that the Court was creating a precise or rigid formulation for a *scienter* determination or that any other statement is necessarily deficient. A knowledge

[2]See also *Rosen* v. *United States,* 161 U.S. 29, 41 where the same issue was presented:

> The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents,* the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. [Emphasis added.]

of the "contents, character, and nature" of the materials is substantively no different than a knowledge of the materials' "sexual orientation." Indeed, the charge of the district court in *Hamling* required the jury to find only that the defendants "had knowledge of the character of the materials." 418 U.S. at 119-120, 123. The charge here was not materially different.

The purpose of requiring proof of scienter in an obscenity prosecution is to prevent book sellers and others from being convicted for merely possessing an obscene book, "even though they had not the slightest notice of the character of the books they sold." *Smith* v. *California,* 361 U.S. 147, 152. Thus, in *Mishkin* v. *New York,* 383 U.S. 502, 510-511, and *Ginsberg* v. *New York,* 390 U.S. 629, 644 (emphasis omitted), the Court upheld the constitutionality of a scienter definition which indicated " 'that only those who are in some manner aware of the character of the material they attempt to distribute should be punished.' " The "sexual orientation" charge used here achieves such a result. See *United States* v. *Glassman,* 562 F. 2d 954, 958 (C.A. 5); *United States* v. *Linetsky,* 533 F. 2d 192, 204 (C.A. 5); *United States* v. *New Orleans Book Mart, Inc.,* 490 F. 2d, 73, 75 (C.A. 5), certiorari denied, 419 U.S. 1007, rehearing denied, 419 U.S. 116.[3]

Petitioners argue (Pet. 8) that because many magazines that are sexually oriented are not obscene, defining scienter in terms of sexual orientation would emasculate the scienter requirement in many cases. Petitioners confuse the requirement of scienter with that of obscenity. Distribution of sexually oriented materials is not illegal

[3]In *Ballew* v. *Georgia,* No. 76-761, decided March 21, 1978, slip op. 5, the Court did not reach the question of "the constitutional sufficiency of the jury instructions on scienter and constructive, rather than actual, knowledge of the contents of the film," and accordingly that case has no bearing here (see Pet. 7-8).

unless the materials meet the constitutional standard of obscenity. The scienter requirement comes into play only if the materials are obscene and, as indicated, its purpose is to protect the innocent distributor of admittedly obscene materials.

2. Petitioners contend (Pet. 10-11) that their convictions on the counts involving "Private No. 8" should have been reversed because the jury's consideration of the illegally seized "Color Climax" magazines might have improperly influenced its determination that "Private No. 8" was obscene. The obscenity *vel non* of a specific magazine, however, is particularly amenable to an independent determination by the jury. Indeed, the jury acquitted both petitioners on one count charging the interstate shipment of a magazine entitled "Homosexual Boys."[4] This indicates that the jury carefully scrutinized the contents of each magazine and did not convict petitioners for shipping "Private No. 8" simply because of the "offensive" and "grotesque" (Pet. 10-11) depictions in the "Color Climax" magazines.

Petitioners also argue that introduction of the "Color Climax" magazines might have influenced the jury's finding that petitioners were aware of the sexual orientation of "Private No. 8" (Pet. 11). But there is no reason to suppose that the jury based its conclusion that petitioners had knowledge of the sexual orientation of "Private No. 8" on the fact that petitioners had scienter as to the "Color Climax" magazines. To the contrary, the mixed verdict is ample evidence that the jury carefully weighed each count separately.

[4]The jury also acquitted petitioner Coryell on the conspiracy count.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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